

## Honorable Samuel J. Steiner Chapter 11

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In re  
MILA, INC.,  
dba Mortgage Inv.  
Debtor.  
TIN: 91-1471279

16 GEOFFREY GROSHONG, chapter 11  
trustee for MILA, Inc.,  
17 Plaintiff,  
18 v.  
19 LAYNE E. SAPP and the marital community  
composed of Layne E. Sapp and Cari Sapp;  
20 NEXT ONLINE MORTGAGE  
TECHNOLOGIES, INC., a Washington  
corporation; LIMA SIERRA LLC, a  
21 Washington limited liability company;  
DESTINY LEASING LLC, a Washington  
limited liability company; CRS  
22 FINANCIAL, LLC, a Washington limited  
liability company; CRS FINANCIAL II,  
LLC, a Washington limited liability  
company, and CRS FINANCIAL III, LLC, a  
23 Washington limited liability company;  
24  
25 Defendants.

Case No. 07-13059-SJS

Adversary Proceeding No. 08-01211-SJS  
[PROPOSED] PRETRIAL ORDER

PRETRIAL ORDER - 1

**MILLER NASH LLP**  
ATTORNEYS AT LAW  
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4400 TWO UNION SQUARE  
601 UNION STREET  
SEATTLE, WASHINGTON 98101-2352

1

**PRELIMINARY STATEMENT**

2

3 This pretrial order is lodged as required by the Court's "Order Directing Lodging  
4 of Pretrial Order" [Docket No. 134] entered February 1, 2010. Although the parties have  
5 exchanged documents and subpoenaed some records from third parties, discovery is not yet  
6 complete. The parties submit this proposed pretrial order while agreeing that no party will object  
7 to any party seeking amendments of it before the December 17, 2010 deadline for the pretrial  
8 order lodging in the "Order Re: Discovery and Pretrial Schedule" [Docket No. 115].

9

**JURISDICTION**

10

11 The court has jurisdiction pursuant to 28 U.S.C. §§ 157, 1334, 1367, 2201, and  
12 2202.

13

**CLAIMS AND DEFENSES**

14

15 Plaintiff (sometimes referred to herein as "the Trustee") will pursue the following  
16 claims at trial:

- 17 (1) Violation of RCW 23B.06.400 and RCW 23B.08.310 in payment of  
18 dividends to all shareholders of MILA;
- 19 (2) Breach of fiduciary duties by Mr. Sapp;
- 20 (3) Theft of corporate opportunities by Mr. Sapp;
- 21 (4) Fraudulent transfer under 11 U.S.C. § 548 against each defendant;
- 22 (5) Fraudulent transfer under RCW Ch. 19.40 and 11 U.S.C. §544(b)  
23 against each defendant;
- 24 (6) Breach of a certain Consultant Intellectual Property Agreement  
25 ("Consultant Agreement") by Mr. Sapp;
- 26 (7) Breach of trust under Consultant Agreement by Mr. Sapp;
- 27 (8) Declaratory judgment against Next Online Mortgage Technologies,  
28 Inc. ("Next Online") regarding rights to certain software;
- 29 (9) Breach of contract against Next Online;

(10) Preference claims under 11 USC § 547) against Mr. Sapp, Next Online, CRS II and Lima Sierra; and

(11) Disallowance of claims under 11 U.S.C. § 502(d)) against Mr. Sapp, Next Online and CRS and to set aside unauthorized post-petition transfers under 11 U.S.C. § 549 against Mr. Sapp and Next Online.

The Trustee also seeks to offset the amount to be distributed on account of the allowed claims, if any, of defendants Sapp, Next Online, and CRS Financial, LLC in this bankruptcy case against the amount of the Trustee's judgment against them in this action.

## **DEFENDANTS' AFFIRMATIVE DEFENSES**

Defendants will pursue the following affirmative defenses and claims:

1. Plaintiff lacks standing to assert some or all of his claims, including, without limitation, any and all claims asserted on behalf of shareholders or creditors of MILA.

2. Some or all of Plaintiff's claims, including, without limitation, the first, third, fifth, and sixth claims for relief, are time-barred in whole or in part by the applicable statutes of limitations, statutes of repose, and other applicable law.

3. Some or all of Plaintiff's claims, including, without limitation, the first, second, third, eighth, and fourteenth claims for relief, were fully disclosed to MILA's shareholders and creditors, who expressly or by implication consented to the transactions.

4. Some or all of Plaintiff's claims are barred by the doctrines of waiver, estoppel, and laches.

5. The transferee of each transfer or obligation alleged to form the basis for liability under the fifth claim for relief took for value and in good faith and so has a lien on or may retain any interest transferred pursuant to sections 548(b) and (c) of the Bankruptcy Code.

6. Each transfer alleged to be fraudulent is not avoidable under state law or federal law because each transfer was accepted in good faith and for reasonably equivalent value. The Defendants are entitled to a lien on or a right to retain any interest in the asset transferred.

1 enforcement of an obligation incurred, or a reduction in liability, as applicable, to the extent of  
2 the value given to MILA.

3           7.       Each transfer alleged to be fraudulent (whether under state or federal law)  
4       or preferential is not avoidable to the extent that each transferee gave new value to or for the  
5       benefit of the debtor after the transfer was made. Each transfer was made in the ordinary course  
6       of business and financial affairs of the debtor and the transferee and each transfer was made  
7       pursuant to a good faith effort to rehabilitate the debtor and the transfer secured present value  
8       given for that purpose as well as antecedent debt.

9                   8.        Each transfer alleged to be preferential is not avoidable pursuant to  
10      section 547 of the Bankruptcy Code because no transfer satisfies all of the prerequisites to  
11      avoidance identified in section 547(b) of the Bankruptcy Code. Each transfer is not avoidable to  
12      the extent provided under section 547(c)(1), (2), (3), (4), and (5) of the Bankruptcy Code.

13                   9.         The Trustee has failed to exercise his fiduciary duties as trustee of the  
14 estate of MILA, including without limitation his failure to properly supervise counsel and other  
15 consultants, resulting in the assertion of claims with no legal or factual basis, all of which has  
16 resulted in the defendants incurring unnecessary fees, expenses and other damages.

17                   10. In addition, defendants will pursue the following claims at trial:

## SAPP COUNTERCLAIMS

- 19            1. Default on February 2007 Loan
  - 20            2. Default on April 2007 Loan
  - 21            3. Recovery of Amounts Paid to Columbia Bank
  - 22            4. Section 507(b) Claim
  - 23            5. Indemnification
  - 24            6. Relief from Stay and Immediate Payment of Secured Claims
  - 25            7. Intentional Interference with Contractual Relationships

## **NEXT COUNTERCLAIMS**

1. Pre-Petition Breach of Consulting Agreement
  2. Post-Petition Breach of Consulting Agreement

## **CRS FINANCIAL COUNTERCLAIMS**

1. Breach of Lease
  2. Post-Petition Breach of Lease; failure to pay rent when due
  3. Intentional Interference with Contractual Relationships

## **CRS III COUNTERCLAIMS**

- #### 1. Intentional Interference with Contractual Relationships

The defendants also seek offset/recoupment as to the amount of any judgment

11 against them in this action.

## **PLAINTIFF'S AFFIRMATIVE DEFENSES TO DEFENDANTS' COUNTERCLAIMS**

1. To the extent the counterclaims allege that plaintiff improperly took actions to impose financial hardship on Layne E. Sapp or to try to force him to settle on unfavorable terms (*see* paragraphs 24, 25, and 28 of this defendant's Answer), all of plaintiff's actions were legal, were intended to benefit the estate, and were a reasonable exercise of the Trustee's business judgment.

2. Some or all of the counterclaims are barred because Columbia State Bank, not the Trustee, initiated adversary proceedings described in Sapp's Answer.

3. Some or all of the counterclaims are barred because the Trustee had probable cause for asserting positions with respect to matters regarding Columbia State Bank and directors and officers liability insurance as described in Sapp's Answer.

4. Some or all of the counterclaims are barred because of the privileges afforded to counsel for litigants or because any statements to the media by counsel for the Trustee are true descriptions of the allegations in the pleadings in this case.

1               5. Some or all of the counterclaims are barred by the immunity afforded to  
2 the Trustee and his counsel because the Trustee is a quasi judicial officer.

3               6. Some or all of the counterclaims are barred because the Trustee is  
4 protected by the business judgment rule.

5               7. Some or all of the counterclaims are barred because the Trustee has not  
6 violated any duty imposed by law.

7               8. Some or all of the counterclaims are barred by Federal Rule of  
8 Evidence 408.

9               9. Some or all of the counterclaims are barred by the doctrines of waiver,  
10 estoppel, unclean hands, laches, *in pari delicto*, issue preclusion, lack of subject matter  
11 jurisdiction, or failure to allege facts sufficient to constitute a counterclaim.

12              10. Some or all of the counterclaims are barred because the Trustee has  
13 provided adequate protection pursuant to 11 U.S.C. § 507(b).

14              11. Some or all of the counterclaims are barred by 11 U.S.C. § 502(d).

15              12. To the extent any defendant prevails on any counterclaim, plaintiff is  
16 entitled to set off and recoup each counterclaim against any claims that plaintiff has against such  
17 defendant.

18              13. Mr. Sapp's "Fifth Counterclaim: Indemnification" is barred by one of more  
19 of the following:

20              (a) Defendant Layne E. Sapp failed to demand indemnity or  
21 advancement of expenses from the Trustee, before asserting that counterclaim,  
22 thereby depriving the Trustee and MILA, Inc. of the opportunity to invoke the  
23 procedures for responding to such a claim as provided in RCW 23B.08.510. This  
24 includes the opportunity to determine if Layne E. Sapp has acted in good faith,  
25 whether he reasonably believed that he was acting in the best interests of MILA or  
26

1 not opposed to the best interests of MILA, and whether Sapp is adjudged liable  
2 under the claims in the Second Amended Complaint in this proceeding.

3 (b) Defendant Layne E. Sapp has failed to provide the Trustee  
4 with a written affirmation of his good faith that he has met the standard of  
5 conduct required by RCW 23B.08.510 entitling him to advancement of expenses  
6 and he has failed to provide the Trustee with a written undertaking required by  
7 RCW 23B.08.530 that he has an unlimited general obligation to repay any  
8 advance if it is ultimately determined that he did not meet the standard of conduct  
9 required by RCW 23B.08.510.

10 (c) Defendant Layne E. Sapp admitted that he failed to demand  
11 indemnity or advancement of expenses from the Trustee in a motion he filed in  
12 the MILA bankruptcy, as explained in a Memorandum Decision filed January 5,  
13 2010 in Case No. WW-09-1142 MoPaH by the United States Bankruptcy  
14 Appellate Panel of the Ninth Circuit Court of Appeals. As a result, Layne E. Sapp  
15 is precluded from asserting any claim for indemnity or advancement of expenses.

16 (d) Defendant Layne E. Sapp's conduct as alleged in the  
17 Second Amended Complaint precludes his right to indemnity as to some or all of  
18 the claims.

19 14. Without assuming any burden of proof that properly belongs to  
20 defendants, the conduct complained of in Mr. Sapp's Eighth Counterclaim for intentional  
21 interference with contractual relationships is privileged.

22 15. To the extent any defendant has been damaged, that defendant has failed  
23 to mitigate such damage.

24 16. To the extent defendants claim that the Trustee failed to realize value for  
25 the estate, defendants' own actions interfered with the Trustee's ability to perform.

1           17. With respect to Mr. Sapp's intentional interference claim, there has been  
2 no breach or termination of Sapp's relationship with Columbia State Bank.

3           18. With respect to Mr. Sapp's intentional interference claim, to the extent that  
4 there has been any breach or termination of Sapp's relationship with Columbia State Bank, the  
5 Trustee was not the cause; any such breach, change or termination was the result of MILA's  
6 bankruptcy, the underwriting or reserve requirements of Columbia State Bank, misconduct of  
7 Layne Sapp, or other causes independent of the Trustee's actions.

8           19. The amount of CRS's counterclaims under any leases are limited by  
9 11 U.S.C. § 502(b)(6).

10           **ADMITTED FACTS**

11           1. Plaintiff Geoffrey Groshong is the duly appointed chapter 11 trustee for  
12 MILA. Plaintiff is a partner at Miller Nash LLP.

13           2. Layne E. Sapp ("Sapp") was the founder of and, at all relevant times, a  
14 director, a shareholder, and the chief executive officer of MILA.

15           3. Next Online Mortgage Technologies, Inc. ("Next Online"), is a Washington  
16 corporation and Sapp is a shareholder of Next Online.

17           4. Lima Sierra, LLC ("Lima Sierra") is a Washington limited liability  
18 company and Sapp is a member of Lima Sierra.

19           5. Destiny Leasing, LLC ("Destiny Leasing") is a Washington limited  
20 liability company and Sapp is the sole member of Destiny Leasing.

21           6. CRS Financial, LLC ("CRS") is a Washington limited liability company  
22 and Sapp is a member of CRS.

23           7. CRS Financial II, LLC ("CRS II") is a Washington limited liability  
24 company and Sapp is a member of CRS II.

25           8. CRS Financial III, LLC ("CRS III") is a Washington limited liability  
26 company and Sapp is a member of CRS III.

1           9.     The initial complaint in this matter was filed on or about August 29, 2008.

2           10.    Some of the conduct that is identified in the Second Amended Complaint  
3 took place in the Western District of Washington, and venue is proper in this district.

4           11.    MILA filed its voluntary chapter 11 petition on July 2, 2007.

5           12.    Before filing its voluntary chapter 11 petition, MILA was in the business  
6 of making residential mortgage loans and reselling such loans in the secondary mortgage market.  
7 Some of the loans that MILA originated were made to borrowers with "subprime" credit scores.

8           13.    MILA originated loans to borrowers through a network of independent  
9 mortgage brokers, and MILA intended to sell most of the loans that it originated into the  
10 secondary mortgage markets.

11          14.    MILA borrowed money from so-called "warehouse lenders,"  
12 predominantly large national and international financial institutions that provided MILA with  
13 lines of credit that were used in connection with the funding of residential mortgage loans.  
14 These loans from warehouse lenders were secured by residential mortgage loans made by MILA.

15          15.    MILA's transactions with purchasers in the secondary mortgage markets  
16 were made pursuant to written contracts between the parties.

17          16.    MILA's audited financial statements indicated that in 2004 it had net  
18 income of \$17,156,000 after payment of expenses.

19          17.    MILA's audited financial statements indicate that it paid \$7,983,000 in  
20 cash dividends to its shareholders during 2004.

21          18.    MILA's audited financial statements indicated that in 2004 it had net  
22 income of \$7,629,000 after payment of expenses.

23          19.    MILA's audited financial statements indicate that it paid \$3,248,000 in  
24 cash dividends to its shareholders during 2005.

25          20.    MILA originated almost \$3 billion of loans in 2004.

26

1                   21. MILA retained Deutsche Bank Securities, Inc. ("Deutsche Bank") to  
2 attempt to attract investors in MILA in 2005. Deutsche Bank issued a Private Placement  
3 Memorandum dated October 2005 and distributed it to potential investors, but failed to receive  
4 any offers. Before MILA filed for relief under Chapter 11 of the Bankruptcy Code, it attempted  
5 to but failed to sell assets to a third-party purchaser. In particular, despite extensive negotiations  
6 with Marathon Asset Management, LP, there was no asset sale with it.

7                   22.     MILA entered into several transactions with other companies in which  
8     Layne Sapp maintained an interest, including Next Online, CRS I, CRS III, Destiny Leasing, and  
9     Lima Sierra.

NEXT ONLINE

23. On about October 4, 2001, Sapp incorporated Next Online.

12                   24. On or about November 11, 2004 MILA entered into a written Software  
13 Development and Consulting Services Agreement with Next Online.

14                    25. Beginning in February 2006, MILA entered into a series of agreements  
15 related to support to be provided by NextOnline to MILA.

16 26. At various times, MILA leased aircraft from Lima Sierra.

17                   27. CRS leased office space in the MILA Financial Center to MILA under a  
18 lease dated December 18, 2002, which was amended from time to time. MILA occupied all or  
19 part of the premises covered by the lease agreement after the commencement of MILA's  
20 chapter 11 case.

21                   28. CRS III purchased an unpaved and unimproved parking lot adjacent to the  
22 MILA Financial Center.

23                   29. On or about May 16, 2007, MILA and Sapp entered into a written  
24 "Consultant Intellectual Property Agreement."

### **PLAINTIFF'S FACTUAL CONTENTION**

26 1. By no later than December 31, 2004, MILA, Inc. ("MILA") was insolvent.

1                   2.       In his capacity as director of MILA, Layne E. Sapp ("Sapp") caused  
2   MILA to make distributions to shareholders in 2004 and thereafter in violation of  
3   RCW 23B.06.400 because MILA would not be able to pay its liabilities as they become due in  
4   the usual course of business.

5                   3       As a director, controlling shareholder, and officer of MILA, Sapp owed  
6   fiduciary duties to MILA, including the duties of loyalty and good faith, obliging him to place  
7   the interests of MILA ahead of his personal interests and refrain from engaging in any  
8   self-dealing transactions that were not both entirely fair and fully disclosed.

9                   4.       In self-dealing transactions, Sapp approved excessive compensation for  
10   himself to be paid by MILA and Next Online (and Next Online obtained the revenues to pay  
11   Sapp's salary from its principal customer, MILA).

12                  5.       In self-dealing transactions, Sapp caused MILA to enter into unnecessary  
13   and detrimental contracts with Next Online, and enabled Next Online to improperly obtain the  
14   following:

15                  (a)      The software owned and developed by MILA related to  
16   subprime lending.

17                  (b)      Excessive revenues from MILA for services provided by  
18   Next Online employees that were substantially similar to what MILA had been  
19   providing internally, often with the same persons who had performed those  
20   functions as MILA employees.

21                  6.       In a self-dealing transaction, Sapp arranged for Lima Sierra, Inc. to  
22   provide MILA with use of a jet, at charges that were excessive and unnecessary for legitimate  
23   businesses purposes of MILA.

24                  7.       In a self-dealing transaction, Sapp arranged for Destiny Leasing to provide  
25   MILA with use of a yacht, at charges that were excessive and unnecessary for legitimate  
26   businesses purposes of MILA.

1               8.       In self-dealing transactions, Sapp arranged for MILA to lease real property  
2 from CRS III at an excessive rate; specifically MILA leased property purportedly for parking at a  
3 time when MILA did not need the space.

4               9.       Defendants have received improper insider transfers avoidable pursuant to  
5 11 U.S.C. § 547 that are recoverable under 11 U.S.C. § 550.

6               10.      Proofs of claims filed by defendants should be disallowed because  
7 pursuant to 11 U.S.C. § 502(d), the court must disallow any claim of any entity from which  
8 property is recoverable under 11 U.S.C. §§ 550 or 553 or that is a transferee of a transfer  
9 avoidable under 11 U.S.C. §§ 544, 547, or 548, unless such entity or transferee has paid the  
10 amount, or turned over any such property, for which such entity or transferee is liable under  
11 11 U.S.C. §§ 550 or 553 to the Trustee.

12              11.      Because discovery is continuing, the Trustee reserves the right to raise  
13 additional factual contentions.

14              **DEFENDANTS' FACTUAL CONTENTIONS**

15              1.       According to its independent auditors, creditors, outside professionals and  
16 audited financial statements, MILA was and remained solvent during all relevant time periods  
17 and Mr. Sapp reasonably relied on these assessments.

18              2.       Mr. Sapp did not directly or indirectly misappropriate business  
19 opportunities available to MILA.

20              3.       All transactions between MILA, Mr. Sapp, and related entities were fair to  
21 MILA.

22              4.       MILA's transactions with Mr. Sapp and related parties were consistent  
23 with Ms. Sapp's duties of loyalty and good faith.

24              All transactions between MILA, Mr. Sapp and related parties about which the  
25 Trustee has complained were disclosed to key creditors of MILA.

26

1               5.     Neither Mr. Sapp nor Next Online Mortgage Technologies claims  
2 ownership of AccessPoint; Mr. Sapp delivered source code for AccessPoint to the Trustee  
3 through MILA's counsel in July 2007.

4               6.     The software program developed by Next Online Mortgage Technologies  
5 known as Credex is not AccessPoint.

6               7.     The Trustee hired his own law firm to pursue this action, has failed to  
7 exercise independent judgment and control over the litigation, and as a result has incurred  
8 expenses not reasonably likely to benefit MILA's estate.

9               8.     The Trustee has instituted proceedings and asserted claims that he knew or  
10 should have known were defective or lacked merit.

11              9.     MILA is in default on a \$1 million promissory note dated February 20,  
12 2007 and a \$250,000 promissory note dated April 16, 2007, both of which are secured by  
13 substantially all of the remaining assets of the MILA bankruptcy estate.

14              10.    Mr. Sapp as guarantor, paid interest and other fees and expenses to  
15 Columbia Bank on MILA's behalf after MILA breached its obligations under loan documents,  
16 dated November 10, 2006.

17              11.    Substantially all of the cash in MILA's estate constitutes defendants' cash  
18 collateral.

19              12.    Mr. Sapp is entitled to indemnification from MILA under the terms of its  
20 articles of incorporation and bylaws for claims asserted against him in his capacity as an officer  
21 or director of MILA.

22              13.    The Trustee has tortiously interfered with the defendants' contractual  
23 relationships with Columbia Bank.

24              14.    MILA has breached the February 1, 2006 Consulting Services Agreement.  
25  
26

1                           15. MILA has breached the Lease Agreement, as amended, dated  
2 December 18, 2002; in addition, the Trustee has failed rent due on the space occupied by him  
3 post-petition.

4                   16. Any transfers otherwise avoidable under Section 547 of the Bankruptcy  
5 Code are not recoverable by the Trustee.

6                   17. Because discovery is continuing, the Defendants reserve the right to raise  
7 additional factual contentions.

## **ISSUES OF LAW**

9                                  The following are the issues of law identified by the plaintiff to be determined by  
10                                 the court:

11                   1. Should the court exclude evidence of how any recoveries by the Trustee  
12 will be used?

13                   2.       May Sapp rely on exculpatory provisions in MILA's articles of  
14 incorporation as a defense to the breach of fiduciary duty claims?

15                   3.         Are the Trustee's actions with respect to Columbia State Bank and its  
16 relationship with Sapp admissible? If so, is the Trustee protected by quasi-judicial immunity, the  
17 business judgment rule, or because he had probable cause to take the actions?

18                   4.         Are the Trustee's actions with respect to directors and officers liability  
19         insurance admissible? If so, is the Trustee protected by quasi-judicial immunity, the business  
20         judgment rule, or because he had probable cause to take the actions?

21                   5.     What are the procedural and substantive prerequisites that a corporate  
22     officer or director must fulfill to be entitled to indemnity from the Trustee?

23                   6. To what extent, if any, may Sapp offer evidence that he relied on legal  
24 advice in any related party transaction, if the related parties were both represented by the same  
25 law firm?

1                   7.     May Sapp offer evidence in his defense that many persons did not  
2 anticipate the "subprime meltdown" that has led to failure of many subprime lenders?

3                   8.         What foundation must Sapp lay before presenting testimony that various  
4 financial institutions (e.g., Credit Suisse, Deutsche Bank, GMAC-Residential Funding)  
5 continued to do business with MILA during the time periods when the Trustee claims that MILA  
6 was insolvent?

7                   9.         What foundation must Sapp lay before presenting testimony from  
8     McGladrey & Pullen, LLP (MILA's outside auditors) that MILA was a going concern and a  
9     solvent business?

10 The following are the issues of law identified by the defendants to be determined  
11 by the court:

12                   1. Which, if any, claims by the Trustee are eligible for trial by jury?

13                   2. To what extent are the Trustee's claims barred by the statute of

14 limitations?

15                           3.     Do any of the Trustee's expert witnesses qualify as experts under the  
16     Federal Rules of Evidence?

17                          4. Because discovery is continuing, the Defendants reserve the right to raise  
18 additional legal issues.

## **EXPERT WITNESSES**

20 (a) Each party shall be limited to eight expert witnesses.

21 (b) Based on the discovery and pleadings so far, which discovery is not yet  
22 complete, Plaintiff's expert witnesses, and the subjects on which they will testify are as follows:

23                   1. Daniel Scouler  
24                   1800 Century Park East, Ste. 600  
                      Los Angeles, CA 90067

25 The issue upon which he will testify is when MILA became insolvent and why.  
26 (Will testify)

1           2.     David Scouler  
2           445 Park Avenue, 10<sup>th</sup> Floor  
3           New York, NY 10022

4           The issue upon which he will testify is on Next Online related party transactions  
5           and software issues, and appropriate compensation for Next Online employees. (Will testify)

6           3.     Professor Douglas Branson  
7           University of Pittsburgh  
8           3900 Forbes Avenue  
9           Pittsburgh, Pennsylvania 15260

10          The issue upon which Professor Branson will testify is on corporate governance  
11          issues including breaches of fiduciary duties. (Will testify)

12          4.     Larry Portal  
13          FTI Consulting  
14          101 Eisenhower Parkway  
15          Roseland, NJ 07068

16          The issue upon which he will testify is on appropriate compensation for Sapp as  
17          the Chief Executive Officer of MILA. (Will testify)

18          5.     Maris Kurens  
19          1312 243rd Avenue NE  
20          Sammamish, WA 98074

21          The issue upon which he will testify is on software issues. (Will testify)

22          6.     Real Estate Professional (TBD)

23          This expert will testify as to the market rates and expected usage of parking  
24          spaces for MILA.

(c) Defendants' expert witnesses, and the subjects on which they will testify

2 are as follows:

1. Layne Sapp  
c/o Davis Wright Tremaine LLP  
1201 Third Ave, Suite 2200  
Seattle, WA 98101

Defendants' counterclaim damages (will testify)

2. Luke Adamson  
c/o Davis Wright Tremaine LLP  
1201 Third Ave, Suite 2200  
Seattle, WA 98101

Software issues and Next consulting services (may testify)

3. Ubermind, Inc.  
2400 NW 80th St.  
Seattle, WA 98117  
06.633.1167

#### Software issues and consulting services (may testify)

4. Christie J. Bakker  
McGladrey & Pullen  
1145 Broadway Plaza, Suite 900  
Tacoma, WA 98402  
253.572.7111

#### MILA financial condition (may testify)

## **OTHER WITNESSES**

(a) Based on the discovery so far (which is not complete), Plaintiff expects to

call the following non-expert witnesses to testify about the following subjects:

**NAME**

ISSUE

1. Geoffrey Groshong  
Miller Nash LLP  
4400 Two Union Square  
601 Union Street  
Seattle, WA 98101  
(Will testify)

Financial condition of MILA, Inc. since filing of bankruptcy petition; claims asserted by warehouse lenders, bulk loan purchasers, and other creditors; custody of MILA, Inc. records; general nature of MILA business.

- 1
2. Layne Sapp  
4242 Hunts Point Road  
Hunts Point, WA 98004  
(Will testify)
- 3
- 4
- 5
- 6
7. Aaron Morse  
6320 E. 35<sup>th</sup> Avenue  
Anchorage, AK 99504  
(possible witness only)
- 8
- 9
10. Douglas Prince  
Foster Pepper PLLC  
1111 Third Avenue  
Suite 3400  
Seattle, WA 98101  
(Will testify)
- 11
- 12
- 13
14. Douglas Schwed  
12722 N.E. 28<sup>th</sup> Street  
Bellevue, WA 98005  
(Will testify)
- 15
- 16
17. Jaennae Dinius  
6409 158<sup>th</sup> Street S.E.  
Snohomish, WA 98296  
(Possible witness only)
- 18
- 19
20. Barney Guy  
10705 226<sup>th</sup> Street, S.W.  
Edmonds, WA 98020  
(Possible witness only)
- 21
- 22
23. Tina Gonsalves  
2048 13<sup>th</sup> Avenue West #6  
Seattle, WA 98119  
(Director of Marketing)  
(Possible witness only)
- 24
- 25
- 26
- MILA's financial condition, lack of shareholder meetings, executive compensation, dividends, related party transactions described in complaint, Sapp's actions as sole director of MILA, transfer of MILA staff to Next Online, accounting for repurchased loans, lending practices and standards, ownership of software; dealings with outside auditors, deletion of electronic evidence.
- Creation by MILA of "Next," Jasper, AccessPoint, Decision Point, Credex software; use of MILA employees to staff Next Online, absence of shareholder meetings of Next Online; availability of similar "off the shelf software."
- Multiple legal representation of MILA, Sapp, Next Online, and related entities; absence of valid waiver of conflict of interest; legal services to MILA; attempted transfer of software ownership from MILA to Next Online, communications with Sapp.
- Preparation of MILA director minutes and resolutions, absence of MILA shareholder meetings, related party transactions described in complaint, communications with Sapp, deletion of electronic evidence.
- Compensation practices; relationship with Sapp.
- Extent of disclosures to warehouse lenders and bulk loan purchasers, treatment of repurchase obligations, financial status of MILA, lending practices of MILA; dealings with auditors; efforts to find investors/capital; secondary markets.
- MILA software ownership; MILA marketing efforts; treatment of repurchase obligations.

- 1       11. Vicki Littell  
2           6 Harbor Boulevard  
3           Burbank, WA 99323  
4           (Possible witness only)
- 5       12. Mark Hikel  
6           1000 First Avenue, #2202  
7           Seattle, WA 98104  
8           (Possible witness only)
- 9       13. Sarah Hikel  
10           1000 First Avenue, #2202  
11           Seattle, WA 98104  
12           (Possible witness only)
- 13      15. Luke Adamson  
14           Address is believed to be:  
15           2643 38<sup>th</sup> Avenue  
16           Seattle, WA 98199  
17           (Possible witness only)
- 18      16. Sandy Kottke,  
19           fka Sandy Murray  
20           31122 State Route 9 N.E.  
21           Arlington, WA 98223  
22           (Possible witness only)
- 23      17. William Dougherty  
24           15203 102<sup>nd</sup> Avenue N.E.  
25           Bothell, WA 98011  
26           (Possible witness only)
- 27      18. Greg Heitlauf  
28           10419 134<sup>th</sup> Avenue N.E.  
29           Kirkland, WA 98003
- 30           Relationship between MILA and Next Online, Inc.,  
31           instructions from Sapp on related party  
32           transactions, admissions by Sapp on financial  
33           status of MILA.
- 34           MILA's financial condition, lack of shareholder  
35           meetings, executive compensation, dividends,  
36           related party transactions described in complaint,  
37           Sapp's actions as sole director of MILA,  
38           accounting for repurchased loans, lending practices  
39           and standards, ownership of software; dealing with  
40           outside auditors.
- 41           MILA's financial condition, lack of shareholder  
42           meetings, executive compensation, dividends,  
43           related party transactions described in complaint,  
44           Sapp's actions as sole director of MILA,  
45           accounting for repurchased loans, lending practices  
46           and standards, ownership of software; dealing with  
47           outside auditors.
- 48           Charges by Next Online to MILA; facts to support  
49           or oppose statements he has presented to the court,  
50           dividends and salary payments to Sapp, accounting  
51           practices at MILA.
- 52           MILA recordkeeping and filing; occupancy of  
53           MILA headquarters building by MILA and other  
54           companies, size of workforce at MILA and Next  
55           Online.
- 56           Financial status of MILA; negotiations with  
57           auditors; financial treatment of repurchase  
58           obligations; ownership of MILA software; fees  
59           paid in related party transactions; salary and  
60           dividend payments to Sapp.
- 61           Ownership and possession of software source  
62           codes.

- 1       19. Marathon Private Equity  
2           Fund I, LLC  
3           c/o Heather Bishop  
4           Lowenstein Sandler PC  
5           65 Livingston Avenue  
6           Roseland, NJ 07068  
7           (Possible witness; testimony  
8           would be by deposition)

9       20. McGladrey & Pullen  
10          1145 Broadway Plaza, Suite  
11          900  
12          Tacoma, WA 98402  
13          Christie J. Bakker (lead audit  
14          partner)  
15          (Possible witness only)

16       21. Deutsche Bank Securities  
17          Andrew Kass  
18          John Winkler  
19          c/o Caroline Whittemore,  
20          Deutsche Bank Legal  
21          Department  
22          60 Wall Street, 36th Floor  
23          New York, NY 10005  
24          (Possible witness; testimony  
25          would be by deposition)

26       22. Trent Gillespie  
1          5730 N.E. 56<sup>th</sup> Street  
2          Seattle, WA 98105  
3          (Director of Information  
4          Technology at MILA)  
5          (Possible witness only)

6       24. Carla Rei  
7          11744 N.E. 148<sup>th</sup> Place  
8          Kirkland, WA 98034  
9          (former MILA and Next Online  
10       IT employee)  
11          (Possible witness; testimony  
12       only)

13          Financial status of MILA; ownership of MILA  
14          software; valuation of MILA; potential purchase of  
15          MILA, Inc. or its software.

16          Going concern status of MILA; MILA financial  
17          statements; treatment of repurchase obligations;  
18          reports by McGladrey and Pullen to MILA  
19          management; status of financial controls at MILA;  
20          related party transactions; ownership of software;  
21          extent of disclosures received from MILA.

22          Unsuccessful efforts to raise capital for MILA;  
23          status of information it analyzed regarding MILA's  
24          repurchase obligations.

25          Development of MILA and Next Software, need  
26          for outside consultants.

27          Ownership of MILA software; transfer of MILA  
28          staff to Next Online.

- 1 25. Cristina Ruiz  
2 117 Bristlecone Circle  
3 Bailey, CO 80421  
4 (Possible witness; testimony  
5 would be by deposition)

6 26. Jameson Park  
7 600 Seventh Avenue, #402  
8 Seattle, WA 98104  
9 (MILA controller)  
10 (Possible witness only)

11 27. Shayir Khan  
12 146 N. Canal St., #300  
13 Seattle, WA 98103

14 28. Miles Stover  
15 Turnaround Inc.  
16 3415 A Street N.W.  
17 Gig Harbor, WA 98335

18 29. Skycorp Executive Charters  
19 9724 32nd Drive  
New Everett, WA 98204  
(Possible witness only)

20 30. Credit Suisse First Boston  
21 Mortgage Capital, LLC  
22 Tim Gilbert  
23 11 Madison Avenue  
24 New York, NY  
25 (Possible witness; testimony  
26 would be by deposition)

27 MILA handling of repurchase obligations.

28 MILA dividend payments, MILA financial status;  
29 MILA accounting.

30 Development of software for MILA.

31 Nature of MILA business leading to claims against  
it; status of claims against MILA bankruptcy  
estate; status of MILA's records.

32 Flight logs to show use of corporate jet.

33 Extent of Credit Suisse due diligence to understand  
34 MILA's financial condition, including the analysis,  
35 if any, of how MILA accounted for repurchase  
36 obligations.

(b) Defendants expect to call the following non-expert witnesses to testify

about the following subjects:

**Luke Adamson**  
c/o Davis Wright Tremaine LLP  
1201 Third Ave, Suite 2200  
Seattle, WA 98101

1 Mr. Adamson was the Chief Technology Officer at Next Online Mortgage Technologies, Inc.  
2 He will testify regarding the technology issues in this action, including AccessPoint and Credex,  
3 and the technology services provided by Next Online to MILA.

4           **Christie J. Bakker**  
5           McGladrey & Pullen  
6           1145 Broadway Plaza, Suite 900  
7           Tacoma, WA 98402  
8           253.572.7111

9 Ms. Bakker was the person responsible at MILA's independent auditors, McGladrey & Pullen,  
10 for the preparation of MILA's audited financial statements. Ms. Bakker will testify regarding the  
11 preparation of MILA's audited financial statements in conformance with Generally Accepted  
12 Accounting Principles, including its cash flow statements, ALLL and provision and its opinion  
13 that MILA was a going concern and solvent business.

14           **Rob Beuerk**  
15           Rob Beuerk Consulting  
16           Current Address Unknown

17 Mr. Beuerk was an independent consultant retained by Credit Suisse to conduct annual due  
18 diligence reviews of MILA. Mr. Beuerk may testify regarding his reviews, including his  
19 analysis of loan repurchases and recommendations for renewal of Credit Suisse's correspondent  
20 lending relationship with Credit Suisse.

21           **Aaron Brooks**  
22           Ubermind, Inc.  
23           2400 NW 80th St.  
24           Seattle, WA 98117  
25           206.633.1167

26 Mr. Brooks is the Software Architect Vice President / CFO of Ubermind. Mr. may testify  
27 regarding the technology issues in this action, including AccessPoint and Credex.

28           **Ric Brandt**  
29           10885 NE 4th Street, Suite 500  
30           Bellevue, WA 98004  
31           425.455.8500

32 Mr. Brandt is a First Vice President at CB Richard Ellis in Bellevue, Washington. Mr. Brandt  
33 may testify regarding the defendants' commercial real estate.

34           **Rod Callanta**  
35           Credit Analyst  
36           GMAC-Residential Funding

1       1646 No. California Blvd., Suite 400  
2       Walnut Creek, CA 94596  
3       925.935.0614

4       Mr. Callanta is a Credit Analyst at GMAC-RFC. Mr. Callanta may testify regarding GMAC-  
5       RFC's lending relationship with MILA and its financial monitoring and due diligence of MILA.

6       **Brian Carl**  
7       20700 44th Avenue West  
8       Lynnwood, WA 98036-7742  
9       (425) 921-6398

10      Mr. Carl was a SVP at MILA and a MILA shareholder. Mr. Carl may testify regarding the  
11     issues in this action.

12      **Paul Coudrier**  
13      Credit Suisse Credit Risk Management

14      Mr. Coudrier worked in the Credit Risk Management group at Credit Suisse. Mr. Coudrier may  
15     testify regarding Credit Suisse's lending relationship with MILA and its financial monitoring and  
16     due diligence of MILA.

17      **Bill Dougherty**  
18      20700 44th Avenue West  
19      Lynnwood, WA 98036-7742  
20      (425) 921-6398

21      Mr. Dougherty was the CFO at MILA. Mr. Dougherty has information will testify regarding the  
22     financial issues in this action.

23      **Mark J. Frost**  
24      20700 44th Avenue West  
25      Lynnwood, WA 98036-7742  
26      (425) 921-6398

27      Mr. Frost was the Corporate Treasurer at MILA. Mr. Frost may testify regarding the financial  
28     issues in this action.

29      **Tim Gilbert**  
30      VP Credit Suisse Mortgage Finance  
31      302 Carnegie Center, Suite 200  
32      Princeton, NJ 08540  
33      609.627.5067

1 Mr. Gilbert was a Vice President in the Mortgage Finance Group at Credit Suisse. Mr. Gilbert  
2 may testify regarding Credit Suisse's lending relationship with MILA and its financial  
3 monitoring and due diligence of MILA.

4           **Doug Graham**

5           Credit Suisse

6 Doug Graham is an Analyst at Credit Suisse. Mr. Graham may testify regarding Credit Suisse's  
7 financial monitoring and due diligence of MILA.

8           **Geoffrey Groshong**

9           Miller Nash LLP

10          4400 Two Union Square  
11          601 Union Street  
12          Seattle, WA 98101

13 Geoffrey Groshong is the Trustee. Mr. Groshong will testify regarding the matters addressed in  
14 defendants' counterclaims.

15           **Bernard Guy**

16          20700 44th Avenue West  
17          Lynnwood, WA 98036-7742  
18          (425) 921-6398

19 Mr. Guy was the VP Capital Markets, MILA and a MILA shareholder. Mr. Guy will testify  
20 regarding all issues in this action.

21           **Mark Hikel**

22          20700 44th Avenue West  
23          Lynnwood, WA 98036-7742  
24          (425) 921-6398

25 Mr. Hikel was the President of MILA and a MILA shareholder. Mr. Hikel will testify as to all  
26 issues in this action.

27           **Sarah Hikel**

28          20700 44th Avenue West  
29          Lynnwood, WA 98036-7742  
30          (425) 921-6398

31 Ms. Hikel was the Chief Operations Officer at MILA. Ms. Hikel will testify regarding as to all  
32 issues in this action.

1           **David R. Johnson**

2           Loan Officer  
3           GMAC-RFC  
4           626.533.4414

5           Mr. Johnson is a Loan Officer at GMAC-RFC. Mr. Johnson may testify regarding GMAC-RFC's lending relationship with MILA and its financial monitoring and due diligence of MILA.

6           **Jameson Park**

7           20700 44th Avenue West  
8           Lynnwood, WA 98036-7742  
9           (425) 921-6398

10          Mr. Park was the Controller at MILA. Mr. Park may testify regarding the financial issues in this action.

11          **Shehryar Khan**

12          Ubermind, Inc.  
13          2400 NW 80th St.  
14          Seattle, WA 98117  
15          206.633.1167

16          Mr. Khan is the Chief Executive Officer of Ubermind. Mr. Khan may testify regarding the technology issues in this action, including AccessPoint and Credex.

17          **Richard Liljedahl**

18          20700 44th Avenue West  
19          Lynnwood, WA 98036-7742  
20          (425) 921-6398

21          Mr. Liljedahl was an administrative assistant. Mr. Liljedahl may testify regarding the documents and issues in this action.

22          **William Moffatt**

23          Orange County, California  
24          949.973.4458

25          Mr. Moffatt previously worked at GMAC. Mr. Moffatt may testify regarding GMAC-RFC's lending relationship with MILA and its financial monitoring and due diligence of MILA.

1           **Peter Phelps**  
2       20700 44th Avenue West  
3       Lynnwood, WA 98036-7742  
4       (425) 921-6398

5  
6       Mr. Phelps was the Chief Financial Officer at Next Online Mortgage Technologies, Inc. Mr.  
7       Phelps may testify regarding to the financial issues in this action.

8  
9           **Layne Sapp**  
10      c/o Davis Wright Tremaine LLP  
11      1201 Third Ave, Suite 2200  
12      Seattle, WA 98101

13       Mr. Sapp is a named defendant and the Chief Executive Officer of the corporate defendants. Mr.  
14      Sapp will testify regarding all issues in this action.

15  
16           **Wendy N. Stein**  
17      CPA PS Wendy N. Stein  
18      Snohomish, WA 98290  
19      (360) 668-8601

20       Ms. Stein is a certified public accountant who provided professional services to the defendants.  
21      Ms. Stein may testify regarding financial issues in this action.

22           **Gary Timmerman**  
23      Formerly, Credit Suisse First Boston Mortgage Capital LLC  
24      302 Carnegie Center, 2d floor  
25      Princeton, NJ 08540  
26      609.915.8092

27       Mr. Timmerman is a former Managing Director at Credit Suisse First Boston Mortgage Capital.  
28      Mr. Timmerman may testify regarding Credit Suisse's lending relationship with MILA and its  
29      financial monitoring and due diligence of MILA.

30  
31           **John Winkler**  
32      Director  
33      Deutsche Bank Securities Inc.  
34      60 Wall St  
35      New York, NY 10005-2858  
36      212.250.5314

37       Ms. Winkler is a Director as Deutsche Bank. Mr. Winkler may testify regarding MILA's Private  
38      Placement Memorandum.

## EXHIBITS

Because discovery is not complete, the parties cannot yet specify each exhibit that will be offered and which exhibits will be stipulated to as admissible or not challenged as to authenticity. The parties will provide such information by the December 17, 2009 deadline set by the Court's scheduling order [Docket No. 115], or such other date as the Court may order.

## **ACTIONS BY THE COURT**

- (a) This case is scheduled for trial on \_\_\_\_\_, 20\_\_\_\_\_, at \_\_\_\_\_.

(b) Trial briefs shall be submitted to the court on or before \_\_\_\_\_.

(c) If the trial will be conducted with a jury, jury instructions requested by  
shall be submitted to the court on or before \_\_\_\_\_. Suggested questions  
to be asked of the jury by the court on voir dire shall be submitted to the court on  
\_\_\_\_\_.

(d) (Insert any other ruling made by the court at or before pretrial conference.)

This order has been approved by the parties as evidenced by the signatures of  
This order shall control the subsequent course of the action unless modified by a  
order. This order shall not be amended except by order of the court pursuant to  
the parties or to prevent manifest injustice.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2010.

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## United States Bankruptcy Judge

1           **FORM APPROVED:**

2           MILLER NASH LLP

4       By: s/Brian W. Esler \_\_\_\_\_  
5           Brian W. Esler, WSBA No. 22168  
6           E-mail: brian.esler@millernash.com  
7           Bruce A. Rubin, WSBA No. 37384  
8           E-mail: bruce.rubin@millernash.com  
9           601 Union Street, Suite 4400  
10          Seattle, Washington 98101  
11          Telephone: (206) 622-8484  
12          Fax: (206) 622-7485

2/26/10  
Date

9           *Attorneys for Plaintiff*

10          DAVIS WRIGHT TREMAINE LLP

12       By: s/Steven P. Caplow \_\_\_\_\_  
13          Ragan L. Powers, WSBA No. 11935  
14          E-mail: raganpowers@dwt.com  
15          Steven P. Caplow, WSBA No. 19843  
16          E-mail: stevencaplow@dwt.com  
17          Hugh R. McCullough, WSBA No. 41453  
18          E-mail: hughmccullough@dwt.com  
19          C. Keith Allred, WSBA No. 6577  
20          E-mail: keithallred@dwt.com  
21          1201 Third Avenue, Suite 2200  
22          Seattle, Washington 98101  
23          Telephone: (206) 622-3150  
24          Fax: (206) 757-7700

2/26/10  
Date

19           *Attorneys for Defendants*